87-1850

No. ———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

J.E.T.S., INC.,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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MAY 11, 1988

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Armed Services Board of Contract Appeals have jurisdiction to grant summary judgment in favor of the government, and did the United States Court of Appeals for the Federal Circuit have jurisdiction to affirm that judgment?

2. Was the Petitioner denied due process in that the Armed Services Board of Contract Appeals (and the United States Court of Appeals for the Federal Circuit) utilized Petitioner's conviction in a criminal prosecution *on other matters* as a ground for violation of its Fifth Amendment property rights in the instant case?

3. Was the granting of summary judgment by the ASBCA (as affirmed by the Court of Appeals) barred by either:

   (a) Res judicata; or

   (b) Law of the case?

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IN THE

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OCTOBER TERM, 1987

No. ———

J.E.T.S., INC.,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

The Petitioner, J.E.T.S., INC.,[1] respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Federal Circuit entered on February 11, 1988.

OPINION BELOW

The decision of the Court of Appeals affirmed the decision of the Armed Services Board of Contract Appeals (A.S.B.C.A.) denying petitioner's claim for an equitable adjustment in contract price. A copy of the appellate opinion is attached as Appendix "A". The opinion is reported at 838 F.2d 1196 (Fed. Cir. 1988). The court had earlier denied petitioner's suggestion for hearing *en banc*.

---

[1] J.E.T.S., INC., is a wholly owned subsidiary of ALLIED MANAGEMENT, INC. The following may be considered affiliates: J.E.T.S. WAESCHEREI, GmbH, and OLD DOMINION INSURANCE CO.

JURISDICTION

On February 11, 1988, the Court of Appeals entered judgment affirming the A.S.B.C.A.'s decision denying petitioner's claim for equitable adjustment. The jurisdiction of this court is invoked under Title 28, United States Code, Section 1254(1). No other petitioner is involved in this petition.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment V:

> Nor shall any person . . . be deprived of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

On April 1, 1980, Petitioner, J.E.T.S., INC. (hereinafter "J.E.T.S.") was awarded a full food service management contract at Vandenberg Air Force Base in California. The contract was a firm, fixed price contract which contained a "changes" clause and an "option" clause. The contract was a 100% small business set aside contract which required J.E.T.S. to certify that it was a small business.

On March 23, 1981, respondent, THE UNITED STATES OF AMERICA (hereinafter "government"), attempted to exercise the first year option. J.E.T.S. informed the government that it did not feel the option had been validly exercised and indicated that it would continue to perform the services required, but under protest. Simultaneously, J.E.T.S. presented a claim against the government under the "changes" clause. The government denied the claim and J.E.T.S. timely appealed to the Armed Services Board of Contract Appeals (A.S.B.C.A.), Case Number 26135, in June, 1981.

While the appeal was pending, the government purported to exercise its second year option in January, 1982. J.E.T.S. protested again, but continued to perform services under threat of termination for default.

On August 4, 1982, the A.S.B.C.A. granted summary judgment in favor of J.E.T.S. on the issue of entitlement, holding that the government had not validly exercised its option, and that J.E.T.S.' continued performance constituted a constructive change for which it was entitled to an equitable adjustment. The matter was remanded to the contracting officer to negotiate the amount of such adjustment. *J.E.T.S., Inc.*, ASBCA No. 26135, 82-2 BCA (CCH) ¶ 15,986 (1982).

The time for appeal from the A.S.B.C.A. decision expired without any action by the government, and the A.S.B.C.A. action became final in December, 1982.

The contracting officer failed to render a final decision on quantum, and on July 27, 1983, J.E.T.S. timely filed a notice of appeal and complaint limited to the issue of the quantum of recovery to which it was entitled under the Board's earlier decision. This new case was docketed as A.S.B.C.A. No. 28642.

While the second appeal was pending, on August 31, 1983, a 25 count indictment was issued against Barnette and Gibbs, principal owners of ALLIED MANAGEMENT, INC., which is J.E.T.S.' parent corporation, against ALLIED, and against other related companies and individuals.

The indictments dealt with (1) a laundry services contract in the Federal Republic of Germany; (2) a food service contract at Ft. Lee, Virginia; (3) a food service contract at McConnell Air Force Base, Kansas; and (4) a laundry services contract at Ft. Lee, Virginia.

The indictment at no time mentioned or referred to the Vandenberg contract.

In July, 1984, a jury in the United States District Court for the Northern District of Florida returned verdicts of guilty against the named defendants in the indictment on various counts, none of which dealt with the Vandenberg contract.

In early 1985, the government amended its answer in A.S.B.C.A. No. 28642, contending:

(1) Respondent agrees that appellant is entitled to be paid for the reasonable value of its services that were performed following the government's failure to exercise the option properly as the Board previously ruled. However, it is respondent's position that the measure of the reasonable value of services performed by appellant is measured by the contract price. Appellant is not entitled to additional costs or anticipatory profit that it alleges.

(2) The government's improper exercise of the option under the contract rendered the contract unenforceable. Notwithstanding, the contract is valid to the extent it was performed. Therefore, appellant is entitled only to the amount of money agreed upon in the contract.

(3) Appellant initially entered into the contract by falsely certifying itself as a small business when in fact it was a large business. The contract being a 100% small business set aside would have precluded appellant from being awarded the contract if it had not falsely certified itself as a small business. Appellant has been convicted of numerous false claim violations concerning its certificate as a small business. Appellant's false certification renders the contract void ab initio and entitles appellant as a matter of law to no additional funds for any alleged equitable adjustment.

(4) Failure to exercise an option could not be a constructive change under the contract since the contract ceased to exist when the government improperly exercised the option. However, to the extent it was performed, the contract became valid.

In April, 1985, J.E.T.S. moved for summary judgment striking the four affirmative points raised by the govern-

ment. The government filed a cross-motion for summary judgment in May, 1985.

On October 8, 1986, the United States Court of Appeals for the Eleventh Circuit affirmed the District Court conviction of J.E.T.S.' parent corporation and its owners. *United States vs. Barnette,* 800 F.2d 1558 (11th Cir. 1986).

On January 21, 1987, the A.S.B.C.A. rendered its opinion on the motions for summary judgment in A.S.B.C.A. No. 28642:

> 1. It ruled that the government's first, second and fourth points mentioned above were without merit.
>
> 2. It ruled that the contract was void ab initio because of appellant's false certification as a small business.
>
> 3. It held that the government was entitled to summary judgment and that the appellant had no right of recovery either under the contract or under a quantum valenbant/quantum meruit theory.

J.E.T.S., Inc., ASBCA No. 28642, 87-1 BCA (CCH) ¶ 19,569 (1987). J.E.T.S. filed an appeal to the United States Court of Appeals for the Federal Circuit. The matter was argued to the court on an agreed statement in lieu of appendix, Appendix "B" appended hereto.

The Court of Appeals affirmed the action of the Board.

REASONS FOR GRANTING THE WRIT

I. THE BOARD HAD NO JURISDICTION TO RELITIGATE ENTITLEMENT

By its opinion granting summary judgment in A.S.B.C.A. No. 26135, the Board specifically ruled that the government had not exercised its option and that therefore, either on the theory that there was no remaining contract per se between the government and the appellant, or that there had been a constructive material change to the contract, appellant was entitled to an equi-

table adjustment and the only thing remaining to be determined was the amount of that adjustment.

It is essential to recognize that the only issue litigated in the earlier Board action was entitlement and, thus, if there arose a dispute over quantum, this would (and did) require an entirely new filing by J.E.T.S. Thus, contrary to the finding of the Court of Appeals, Appendix, page 7a, this was not a continuation of the same litigation, but an entirely new action.

By its decision in A.S.B.C.A. No. 28642, the Board reversed itself on the issue of entitlement, something it had absolutely no jurisdiction to do because that issue was res judicata and both the government and the Board were precluded from relitigating that issue.

Res judicata and collateral estoppel serve the dual purposes of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation. They prevent inconsistent decisions and encourage reliance on adjudication. *Parklane Hosiery vs. Shore*, 439 U.S. 322 (1979); *Kremer vs. Chemical Construction Corporation*, 456 U.S. 461 (1982); *Migra vs. Warren City School District Board of Education*, 465 U.S. 75 (1984). The Board had no jurisdiction to relitigate entitlement.

Once the time for appeal has run, a final judgment is res judicata without regard to the fact an appeal might have been taken to a higher court. As recently stated in *Federated Department Stores vs. Moitie*, 452 U.S. 394, 401 (1981):

> The doctrine of res judicata serves vital public interests beyond any individual judges' ad hoc determination of the equities in a particular case. There is simply "no principle of law or equity which sanctions the rejection . . . of the salutary principle of res judicata." The Court of Appeals' reliance on "public

> policy" is similarly misplaced. This Court has long recognized that "public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties," *Baldwin v. Traveling Men's Assn.*, 283 U.S. 522, 525 (1931).

The government cannot qualify for any exception to the principle of issue preclusion under some colorable claim that it did not know, and could not have known, of the potential problems with J.E.T.S.' certification that it was "small." In fact, as the indictment, conviction, and appellate decision clearly point out, J.E.T.S.' size was challenged as early as 1979. Thus, there can be no question that as of the date on which the Board granted J.E.T.S.' motion for summary judgment in August, 1982, the government knew, or should have known, that J.E.T.S. had been the subject of investigation and challenge as to its size.

The government and the Board are thus bound by the rules of res judicata and preclusion, and for the Board to double back on itself as it did in the instant action is legally intolerable, without any basis in law or in equity. *Sidney vs. Zah*, 718 F.2d 1453, 1459 (9th Cir. 1983); *Town of Seabrook vs. New Hampshire*, 738 F.2d 10, 11 (1st Cir. 1984); *Lee vs. City of Peoria*, 685 F.2d 196, 199, note 4 (7th Cir. 1982).

II. THE GRANTING—AND AFFIRMANCE—OF SUMMARY JUDGMENT BASED ON J.E.T.S.' PARENT'S CONVICTION CONSTITUTED ABUSE OF DISCRETION, PREJUDICIAL ERROR, AND DENIAL OF DUE PROCESS

The A.S.B.C.A. opinion candidly states:

> The present contract was not included in the indictments and convictions.

87-1 BCA at 98,913.

The Court of Appeals opinion candidly states:

> A major charge of the indictment was that in obtaining four other government contracts, Allied had falsely certified that it was a small business. Two of those contracts were food service contracts at other military bases and two others were laundry service contracts at a military base and in the Federal Republic of Germany.

Appendix, pages 5a-6a.

> J.E.T.S. stresses that the present contract was not involved in the criminal case and that J.E.T.S. was not a defendant in that case.
>
> Although J.E.T.S. was not a party in the criminal case, it was very much a part of the activities upon which the criminal convictions were based. The Court of Appeals described J.E.T.S. as "a wholly owned subsidiary of Allied that performed government service contracts throughout the world." . . . As a wholly owned subsidiary of Allied, J.E.T.S. appears to have functioned as Allied's operating division and alter ego.

Appendix, pages 9a-10a.

> The criminal conviction thus would have estopped Allied, Barnette, and Gibbs from denying before the Board that they had misrepresented to the government that the contractors for the four other contracts involved in the criminal proceedings were small businesses, since that question had been "distinctly put in issue and directly determined" in the criminal case.
>
> Those four contracts were similar to the contract in the present case. Two were food service contracts, and two were laundry service contracts. All of them were executed and performed at the same time as the present contract. In all four of them, the certificates of small business qualification were false because, in determining the size of the contractor, the receipts of affiliates of the contractor were ignored in violation of the regulation requiring those receipts to be included.

Appendix, page 10a.

Apparently, neither the Board nor the Court of Appeals could directly cope with the fact that Allied was convicted in contracts *other than* those at Vandenberg Air Force Base.

The Supreme Court has clearly held that a prior conviction may work an estoppel in favor of the government, but such estoppel extends only to questions distinctly put in issue and directly determined in the criminal prosecution. *Emich Motors Corporation vs. General Motors Corporation*, 340 U.S. 558, 569-572 (1951); *Frank vs. Mangum*, 237 U.S. 309, 334 (1915); *Sealfon vs. United States*, 332 U.S. 575 (1948).

In *United States vs. Uzzell*, 648 F. Supp. 1362 (D.D.C. 1986), the government brought a civil action under the False Claims Act against defendants previously convicted of criminal conspiracy to defraud the government by false claims. The court held that a trial court must look to the record, the pleadings, the evidence submitted, the jury instructions, and any opinions of the court in aid of its determination as to whether or not the question under consideration had been placed in issue and fairly litigated in the criminal action.

In *Drum vs. Nasuti*, 648 F. Supp. 888, 897-898 (E.D. Pa., 1986), *aff'd. mem.*, 831 F.2d 286 (3d Cir. 1987), the court further amplified the criteria necessary to raise the collateral estoppel issue:

> 1. The issue decided in the prior adjudication must be identical with the one presented in the later action.
>
> 2. There must have been a final judgment on the merits.
>
> 3. The party against whom the doctrine is asserted must have been a party or in privity with a party to the other action.
>
> 4. The party against whom it is asserted had a full and fair opportunity to litigate the specific issue in question in the prior litigation, and
>
> 5. The issue decided was essential to the judgment.

Here, of course, neither the A.S.B.C.A. nor the Court of Appeals reviewed the transcript of the proceedings, the findings of the jury, or anything else of a direct nature involved in the criminal action against Allied. The sole support for the position espoused by the A.S.B.C.A. and affirmed by the Court of Appeals were the indictment and the Appeals Court's *per curiam* opinion affirming the criminal judgment. Since the right of appellate review is limited to questions of law and does not extend to matters of fact, *Duncan vs. Atchison, T. and S.F.R. Co.*, 72 Fed. 808 (C.A. 9th 1896); *Bond vs. Brown*, 12 How. (53 U.S.) 254 (1851); *Ralston Purina Company vs. Novak*, 111 F.2d 631 (8th Cir. 1940), there is no conceivable way in which the A.S.B.C.A. could have extracted facts from the appellate decision and grafted them onto its own opinion denying J.E.T.S. recovery.

Unless the examination of the entire record removes all questions concerning the criteria for estoppel, there can be no estoppel created by the criminal conviction, *De Sollar vs. Hanscome*, 158 U.S. 216 (1895); *Washington Gas Light Company vs. District of Columbia*, 161 U.S. 316 (1896).

III. WHETHER OR NOT THE PETITIONER WAS A SMALL BUSINESS WAS NOT AT ISSUE

Even assuming, without conceding, that the government and the Board could somehow have acquired jurisdiction despite the clear bar of res judicata in this case, the A.S.B.C.A.'s reasoning, equating the criminal conviction with this contract, fails on several counts:

1. There was no specific determination that J.E.T.S. was "large" for this specific contract.

2. J.E.T.S. never litigated the issue of whether or not the receipts of J.E.T.S. WAESCHEREI, GmbH, ALLIED, or OLD DOMINION, which are separate but related corporations, could be chargeable to J.E.T.S., INC.

3. The Board made no finding of alter ego as between J.E.T.S., INC., and ALLIED, J.E.T.S. WAESCHEREI, GmbH, or OLD DOMINION.

4. A statement by the Board that ALLIED, the parent, continued to bid on small business set aside contracts, does not furnish proof for this contract that J.E.T.S., INC., a separate corporation, must, of necessity, be charged with the errors of its parent.

The cases of *United States vs. Mississippi Valley Generating Company*, 364 U.S. 520 (1961), and *K & R Engineering Company, Inc. vs. United States*, 616 F.2d 469 (Ct. Cl. 1980), cited by the Court of Appeals, Appendix, page 8a, are distinguishable and irrelevant because:

1. Each of those cases dealt with direct conflict of interest between government officials and the contractors with regard to specific contracts.

2. In neither case had there been a final, binding decision in favor of the contractor, which would remove the issue from the jurisdiction of the determining board.

The *only* issue before the A.S.B.C.A. was *quantum*, since, as a matter of law which became final and remained unappealed by the government, entitlement had been determined in the earlier hearing and thus became the law of the case, *Pubali Bank vs. City National Bank*, 777 F.2d 1340 (9th Cir. 1985); *Waggoner vs. Dalliare*, 767 F.2d 589 (9th Cir. 1985), *cert. denied*, 475 U.S. 1064 (1986); *Cardwell vs. Kurtz*, 765 F.2d 776 (9th Cir. 1985).

The Court of Appeals citations to *United States vs. Turtle Mountain Band of Chippewa Indians*, 612 F.2d 517, 520 (Ct. Cl. 1979); *Schwartz vs. N.M.S. Industries, Inc.*, 575 F.2d 553, 554 (5th Cir. 1978); *White vs. Murtha*, 377 F.2d 428, 432 (5th Cir. 1967); *Smith International, Inc. vs. Hughes Tool Company*, 759 F.2d 1572, 1576 (Fed. Cir.), *cert. denied*, 474 U.S. 827

(1985), and *Gindes vs. United States*, 740 F.2d 947, 950 (Fed. Cir.), *cert. denied*, 469 U.S. 1074 (1984), Appendix, pages 7a-8a, are misplaced. The Court of Appeals erroneously concluded that the second Board appeal was but a further step in the litigation of the same case. It was not. It was an entirely new action. Since there was never any attempt to set aside the initial determination of the A.S.B.C.A., it worked a denial of due process and a concomitant deprivation of J.E.T.S., INC's., property to go around to the back door when the front door had not been opened.

CONCLUSION

In conclusion, Petitioner J.E.T.S., INC., respectfully requests that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Federal Circuit.

Respectfully submitted,

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Dated: May 11, 1988

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

87-1269

J.E.T.S., INC.,

Appellant,

v.

THE UNITED STATES,

Appellee.

Hugo N. Gerstl, of Gerstl & Gorman, Monterey, California, argued for appellant.

J. Keith Burt, of the Commercial Litigation Branch, Department of Justice, argued for appellee. With him on the brief were *Richard K. Willard*, Assistant Attorney General, *David M. Cohen*, Director, and *Mary Mitchelson*, Assistant Director.

Appealed from: Armed Services Board of Contract Appeals.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

87-1269

J.E.T.S., INC.,

Appellant,

v.

THE UNITED STATES,

Appellee.

DECIDED: February 11, 1988

Before MARKEY, *Chief Judge*, FRIEDMAN, *Circuit Judge*, and BALDWIN, *Senior Circuit Judge*.

FRIEDMAN, *Circuit Judge*.

This is an appeal by a government contractor from a decision of the Armed Services Board of Contract Appeals (Board) denying the contractor's claim for an equitable adjustment in the contract price. The Board previously had held that the contractor was entitled to such an adjustment and remanded the case to the contracting officer to determine the amount thereof. After the contracting officer had denied any award and while the contractor's appeal from that ruling was pending before the Board, a corporation of which the contractor was a wholly-owned subsidiary and the two principals of that corporation were indicted and convicted of various offenses against the government. A major element of the criminal case was that they had falsely certified that the coporation was a small business, for which both the other

contracts involved in the criminal case and the contract in the present case were set aside. On the basis of the convictions, the Board held that the contractor was not entitled to recover. We affirm.

I

A. On April 1, 1980, the United States Air Force entered into a contract with the appellant, J.E.T.S., Inc., under which J.E.T.S. would furnish all necessary personnel for full food service management at an air base. The contract was for one year. The government had the option to extend the contract for two subsequent years at the same price by giving specified notices.

At the close of the first year of performance, the government, on March 31, 1981, exercised its option to extend the contract for another year at the same price. The government's written exercise of the option stated:

> Funds are not presently available for this procurement. The Government obligation is contingent upon the availability of appropriated funds from which payment for the contract purposes can be made. No legal liability on the part of the Government for payment of any money shall arise unless and until funds are made available to the Contracting Officer for this procurement and notice of such availability, to be confirmed in writing by the Contracting Officer, is given to the contractor.

In response to J.E.T.S.' request for an immediate ruling on whether the government properly had exercised its option, the contracting officer ruled on May 5, 1981, that the exercise was proper. J.E.T.S. performed the contract for the second year under protest, stating that it expected to be paid the reasonable value of its services. The government paid it at the contract price.

On J.E.T.S.' appeal from the contracting officer's decision, the Board held that the government's exercise of the option was invalid. The Board stated:

> It is well settled that in order for the Government to properly exercise an option, its acceptance of the offer must be unconditional and in exact accord with the terms offered. (Citations omitted.) Here the purported execution of the option included the availability of funds clause and made the execution conditional upon the subsequent availability of funds for performance of the contract and written notice to appellant of such availability. It is undisputed that funds were not available for performance during the option period on or before the date for acceptance of the option, 15 April 1981, nor by the date of commencement of the second year of the contract, 1 May 1981.
>
> . . . .
>
> . . . Appellant's continued performance constituted a constructive change under the contract for which it is entitled to an equitable adjustment. The appeal is sustained and the matter is remanded to the contracting offier to negotiate the amount of such adjustment.

J.E.T.S., Inc., 82-2 B.C.A. (CCH) ¶ 15, 986, at 79,274 (1982).

While the appeal before the Board was pending, the government exercised the option to renew the contract for a third year at the original price. J.E.T.S. responded that the government had not validly exercised the option for the first extension, that accordingly the contract was no longer in effect, and that the second option therefore could not be exercised. J.E.T.S. continued to perform the contract under protest through the third year, and the government continued to pay J.E.T.S. at the contract price.

Following the decision of the Board, J.E.T.S. filed with the contracting officer claims for an equitable adjustment for the second and third years of the contract. When the contracting officer failed to issue a decision within the time specified in the Contract Disputes Act of 1978, 41 U.S.C. § 605(c)(1) (1982), J.E.T.S. filed an appeal with the Board. (The contracting officer subsequently denied J.E.T.S.' claim in its entirety.)

B. Under the Small Business Act, 15 U.S.C. § 631 (1982), certain government contracts are set aside for small businesses. A small business is "one which is independently owned and operated and which is not dominant in its field of operation." *Id.* § 632. Under regulations of the Small Business Administration explaining when a business is "small," the focus for service industries is on annual receipts, and businesses with annual receipts greater than specified amounts are not "small." 13 C.F.R. §§ 121.1-121.13 (1986). In determining whether a service business is "small," the average annual receipts for the past three years of the company and its affiliates will be considered. *Id.* § 121.2(a)-(c).

The food service management contract that J.E.T.S. entered into was 100 per cent set aside for small business. Before obtaining the contract, J.E.T.S. certified to the Air Force that it was a small business.

C. While the second appeal to the Board was pending, Thomas F. Gibbs, Leo J. Barnette, Allied Management Corporation (Allied), and others were indicted for conspiracy to defraud the government, making false statements to the government, and mail fraud. J.E.T.S. is a wholly-owned subsidiary of Allied. Larry Barnette was the president and principal stockholder of Allied, and Thomas Gibbs was the vice president and minority stockholder.

A major charge of the indictment was that in obtaining four other government contracts, Allied had falsely

certified that it was a small business. Two of those contracts were food service contracts at other military bases and the two others were laundry service contracts at a military base and in the Federal Republic of Germany. These contracts were entered into and performed at various times between January 1, 1977 and August 1982.

The jury convicted the defendants on various charges, and the court of appeals affirmed. *United States v. Barnette*, 800 F.2d 1558 (11th Cir. 1986), *cert. denied*, 107 S. Ct. 1578 (1987). In a section of its opinion captioned "The Small Business Set Aside Program," the court of appeals held:

> [T]he government demonstrated that Allied and its affiliates had become "large" for SBA size purposes for most types of contracts. . . .
>
> Notwithstanding the size of the Allied conglomerate, Allied, through Barnette and Gibbs, continued to submit bids on contracts set aside for small business concerns. From 1978 through 1981, Allied falsely certified on each bid document that it was small, and thus eligible to bid on contracts set aside for small businesses.

Id. at 1565.

D. Following the court of appeals affirmance of the convictions, the government moved before the Board for summary judgment. The Board granted the motion and denied J.E.T.S.' appeal. The Board stated:

> [T]here is no genuine issue of material fact concerning the question of appellant's size or whether during that period appellant was aware that it was a large corporation and knowingly certified to the contrary. The conviction resolved these questions. Therefore, appellant is estopped from now denying that it knowingly and willfully made false, fictitious and fraudulent statements by certifying appellant

> was a small business when it submitted its bid for this small business set aside contract in November 1979.

J.E.T.S., Inc., 87-1 B.C.A. (CCH) ¶ 19,569, at 98,916 (Jan. 16, 1987).

The Board concluded:

> [T]he bad faith of appellant in securing the award made the award voidable, if not void. This was not known to the contracting officer until after completion of the contract and the option period before us. In its pleadings and motion for summary judgment the Government has, in effect, asserted its avoidance of the contract. Having done so, it would pertain not only to the contract but also to the option period before us. We also recognize that the question before us at this time is not entitlement to recover but the amount which the appellant is entitled to recover. However, to permit recovery of any further monies under the circumstances would be an affront to the integrity of the federal procurement process.

Id. at 98,917.

II

J.E.T.S. contends that the earlier decision of the Board that it was entitled to an equitable adjustment because the government had made a constructive change in the contract was *res judicata* concerning its right to recovery, that the only issue open for the Board to decide in the second appeal was the amount of recovery, and that the Board's decision in the second appeal was an impermissible reversal of its prior decision.

Since the second appeal was but a further step in the litigation of the same case, the governing principle for determining what issues were open to the Board is not *res judicata*, but the law of the case. *United States v. Turtle Mountain Band of Chippewa Indians*, 612 F.2d 517,

520 (Ct. Cl. 1979). "Thus, 'once a case has been decided on appeal, the rule adopted is to be applied, right or wrong, absent exceptional circumstances, in the disposition of the lawsuit.'" Id. (quoting *Schwartz v. NMS Indus., Inc.*, 575 F.2d 553, 554 (5th Cir. 1978)). There are three "exceptional circumstances" that justify a departure from the law of the case: "'[T]he evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice.'" *Id.* at 521 (quoting *White v. Murtha*, 377 F.2d 428, 432 (5th Cir. 1967)). *See also Smith Int'l, Inc. v. Hughes Tool Co.*, 759 F.2d 1572, 1576 (Fed.Cir.), *cert. denied*, 474 U.S. 827 (1985); *Gindes v. United States*, 740 F.2d 947, 950 (Fed. Cir.), *cert. denied*, 469 U.S. 1074 (1984).

The Board's decision in the first appeal was "clearly erroneous" and to follow it "would work a manifest injustice." The contract which, according to the Board's decision in the first case, the government constructively had changed, was procured by and therefore permeated with fraud. As discussed in part III below, J.E.T.S. obtained this contract by knowingly falsely stating that it was a small business. Had it stated the truth about its size, it would not have received the contract. A government contract thus tainted from its inception by fraud is void *ab initio*, like the government contracts held void because similarly tainted by a prohibited conflict of interest in *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520 (1961), and *K & R Eng'g Co. v. United States*, 616 F.2d 469 (Ct. Cl. 1980).

If in the first appeal the Board had been aware of J.E.T.S.' fraud in obtaining the contract, the Board would not have held that J.E.T.S. was entitled to an equitable adjustment for the government's constructive change in the contract. The Board correctly stated in the present appeal, "to permit recovery of any further monies under

the circumstances would be an affront to the integrity of the federal procurement process." *See Mississippi Valley*, 364 U.S. at 564-65. "The protection of the integrity of the federal procurement process from the fraudulent activities of unscrupulous government contractors," *K & R Eng'g*, 616 F.2d at 476, fully supported—indeed, required—denial of J.E.T.S.' claim for additional compensation once J.E.T.S.' fraud in obtaining the contract was disclosed. This is so even though, when the fraud was not yet known, the Board earlier had determined that J.E.T.S. was entitled to additional money.

Moreover, since the facts concerning J.E.T.S.' fraud were not known at the time of the first Board decision and became known only during the pendency of the second appeal, the case also comes within the exception covering the situation when "the evidence on a subsequent trial was substantially different." Although there was no subsequent trial, the evidence before the Board on the second appeal was substantially different from that befor it on the first appeal, since it was only on the second appeal that the fraudulent procurement of the contract was disclosed.

III

J.E.T.S. further contends that the Board improperly relied on the criminal convictions of its corporate parent and the two principals as a basis for concluding that the contract was void or voidable because tainted by J.E.T.S.' fraud in falsely representing that it was a small business. J.E.T.S. stresses that the present contract was not involved in the criminal case and that J.E.T.S. was not a defendant in that case.

Although J.E.T.S. was not a party in the criminal case, it was very much a part of the activities upon which the criminal convictions were based. The court of appeals described J.E.T.S. as "a wholly owned subsidiary of Allied that performed government service contracts

throughout the world," 800 F.2d at 1560, and as "part of the Allied conglomerate." 800 F.2d at 1563. The court referred to "Allied, doing business as J.E.T.S." 800 F.2d at 1564. The court noted that during the years involved, Gibbs, who signed the present contract and certified that J.E.T.S. was a small business, filed other false statements on behalf of J.E.T.S. with respect to J.E.T.S.' size. 800 F.2d at 1565. As a wholly owned subsidiary of Allied, J.E.T.S. appears to have functioned as Allied's operating division and alter ego.

"It is well established that a prior criminal conviction may work an estoppel in favor of the government in a subsequent civil proceeding," but the "estoppel extends only to questions 'distinctly put in issue and directly determined' in the criminal prosecution." *Emich Motors Corp. v. General Motors*, 340 U.S. 558, 568-69 (1951). The criminal conviction thus would have estopped Allied, Barnette, and Gibbs from denying before the Board that they had misrepresented to the government that the contractors for the four other contracts involved in the criminal proceedings were small businesses, since that question had been "distinctly put in issue and directly determined" in the criminal case.

Those four contracts were similar to the contract in the present case. Two were food service contracts, and two were laundry service contracts. All of them were executed and performed at the same time as the present contract. In all four of them, the certificates of small business qualification were false because, in determining the size of the contractor, the receipts of affiliates of the contractor were ignored in violation of the regulation requiring those receipts to be included. The other false statements that Gibbs filed with respect to the size of J.E.T.S. had the same flaw of failure to include the receipts of affiliates. The record also showed that in 1980, Gibbs told "an employee not to refer to the German laundry contract in another bid because if J.E.T.S. listed

the laundry contract 'in the experience section, it would have to be included in the gross income also [sic].'" 800 F.2d at 1565.

Considering all the circumstances, we cannot say that the Board erred in concluding that J.E.T.S. had committed fraud in obtaining this contract by knowingly falsely certifying that it was a small business. Neither in its response before the Board to the government's motion for summary judgment nor in its brief before this court did J.E.T.S. assert that it was a small business when it obtained the contract or contend that it could show at a hearing that it filed an accurate certification. The Board correctly concluded that there was "no genuine issue as to any material fact" (Rule 56(c), Federal Rules of Civil Procedure) that precluded summary judgment and that because the contract was fraudulently obtained, the government was entitled to summary judgment denying J.E.T.S.' appeal.

CONCLUSION

The decision of the Board denying J.E.T.S.' appeal is *AFFIRMED.*

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

87-1269

J.E.T.S., INC.,

Appellant,

v.

THE UNITED STATES,

Appellee.

JUDGMENT

On Appeal from the Armed Services Board
of Contract Appeals in Case No(s). 28642

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED: AFFIRMED

ENTERED BY ORDER OF THE COURT

/s/ Francis X. Gindhart
Clerk

Dated Feb. 11, 1988

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

87-1269

J.E.T.S., INC.,

Appellant,

v.

THE UNITED STATES,

Appellee.

AGREED STATEMENT IN LIEU OF APPENDIX

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Attorneys for Appellant

COME NOW appellant, J.E.T.S., Inc., and appellee, United States of America, and pursuant to Rule 6 of the United States Court of Appeals for the Federal Circuit Procedural Handbook, stipulate that the following constitutes an agreed statement of the case in lieu of the record:

Appellant, J.E.T.S., Inc. (hereinafter called "appellant" or "J.E.T.S."), is a Florida corporation with its principal place of business in Jacksonville, Florida. The United States of America, acting through Base Contracting Division, Vandenberg Air Force Base, California (hereinafter called "Air Force", "government" or "appellee"), awarded Contract No. F04684-80-D-0007 to appellant on 1 April 1980. The contract required the appellant to furnish all necessary supervisory, administrative and direct personnel for full food service management at Vandeberg AFB. The contract was a firm fixed price contract in connection with the basic year and contained two option years, with the government given the option to extend the contract.

The contract contained a "change" clause and an "option" clause. The "option" clause provided:

> This contract is renewable, at the option of the government, by the Contracting Officer giving written notice of renewal to the contractor at least 15 days before this contract is to expire, provided that the Contracting Officer shall have given preliminary notice of the government's intention to renew at least 60 days before this contract is to expire. (Such preliminary notice will not be deemed to commit the government to renewals.) If the government exercises this option for renewal, the contract as renewed shall be deemed to include this option provision. However, the total duration of this contract, including the exercise of any options under this clause, shall not exceed three years.

J.E.T.S. commenced performance under the contract on 1 May 1980, and completed performance of the basic year on 30 April 1981.

On or about 23 March 1981, the Contracting Officer furnished to J.E.T.S. Modification to Contract No. P-00004 dated 27 February 1981, effective 1 May 1981, purporting to unilaterally exercise the first year option under the contract and demanded that J.E.T.S. perform the contract services for an additional year for the price set forth in the contract. The purported exercise of the option by the government was expressly conditioned upon the availability of appropriated funds from which payment for the contract purposes could be made. The modification further provided that:

> No legal liability on the part of the government for payment of any money shall arise unless and until funds are made available to the Contracting Officer for this procurement and notice of such availability, to be confirmed in writing, by the Contracting Officer, is given to the contractor.

On April 3, 1981, J.E.T.S. acknowledged receipt of the modification. Although J.E.T.S. agreed to continue performance of the work covered by the contract, J.E.T.S. expressly advised the Contracting Officer that it considered his directions to be unauthorized, improper, and a constructive change in the contract; that J.E.T.S.' continued performance under the contract would be under protest, and that J.E.T.S. would expect to be paid for such work the reasonable value of its services, as opposed to the government contract price, together with general and administrative (G & A), and a reasonable profit. Finally, J.E.T.S. advised the Contracting Officer that it would continue to perform the contract services as directed by him under protest until resolution of the claim as required by the disputes clause in the contract and the provisions of the Contract Disputes Act of 1978. J.E.T.S. requested the immediate issuance of a final decision on

the question of whether or not the Contracting Officer properly exercised the first year option under the contract.

On 5 May 1981, the Contracting Officer rendered his final decision finding that the government had validly exercised the option granted and contained in the contract.

On 15 June 1981, J.E.T.S. appealed the final decision of the Contracting Officer to the Armed Services Board of Contract Appeals. On 24 June 1981 the ASBCA docketed this appeal as ASBCA No. 26135. On 21 September 1981 J.E.T.S. filed an amended complaint in ASBCA No. 26135 wherein it expressly contended that the attempted exercise by the government of the first year option was invalid for the reason that the proposed modification was expressly conditioned upon "the availability of appropriated funds from which payment for the contract purposes can be made" and further provided that "no legal liability on the part of the government for payment of any money shall arise unless and until funds are made available to the Contracting Officer for this procurement and notice of such availability to be confirmed in writing by the Contracting Officer is given to the contractor", thus rendering the purported "exercise" conditional and a legal nullity.

The issue was joined by the government.

Thereupon J.E.T.S. and the government each filed motions for summary final judgment.

On 4 August 1982 the Armed Services Board of Contract Appeals in ASBCA No. 26135 sustained the appeal of J.E.T.S., and in its decision entitled "Opinion by Administrative Judge Burg on Cross- motions for Summary Judgment" held in pertinent part:

> It is well settled that in order for the government to properly exercise an option, its acceptance of the

offer must be unconditional and in exact accord with the terms offered. (citations omitted). Here the purported execution of the option included the availability of funds clause and made the execution conditional upon the subsequent availability of funds for performance of the contract and written notice to appellant of such availability. It is undisputed that funds were not available for performance during the option period on or before the date for acceptance of the option, 15 April 1981, nor by the date of commencement of the second year of the contract, 1 May 1981.

Having concluded that the option exercise was invalid because it was conditional and not in accord with the exact terms of the contract, we need not consider whether it also failed because the government failed to give the proper preliminary notice of its intent to exercise the option.

The government's motion for summary judgment is denied. The appellant's motion for summary judgment is granted. Appellant's continued performance constituted a constructive change under the contract for which it is entitled to an equitable adjustment. The appeal is substained and the matter is remanded to the Contracting Officer to negotiate the amount of such adjustment.

By letter dated 8 January 1982 and prior to the decision of the Board in ASBCA No. 26135, the Contracting Officer furnished J.E.T.S. with "preliminary notice" of the government's intention to renew the subject contract for the second option year covering the period from 1 May 1982 to 30 April 1983 in accordance with the option provision contained in the contract.

By letter dated 18 January 1982 appellant acknowledged receipt of the government's "preliminary notice" of its intent to exercise the second year option under the contract and stated that:

> Essentially, it is the position of J.E.T.S., Inc. that the government failed to timely furnish the preliminary notice of intent to exercise the first one year option under the contract and further, thereafter, failed to properly exercise the option in accordance with the terms of the contract. As a result, it is the position of J.E.T.S., Inc. that the referenced contract, including the options contained therein, is no longer in force or effect and that J.E.T.S. is entitled to be compensated for the services it is performing at the demand and insistence of the Contracting Officer on the basis of the cost of those services, plus its G & A and a reasonable profit. Accordingly, J.E.T.S. disputes the government's right to exercise the option, for which you have given the preliminary notice.
>
> J.E.T.S., Inc. will continue to perform the services covered by the referenced contract under protest until a resolution of the dispute by the Board of Contract Appeals. The continued performance by J.E.T.S. should not be taken by you as a waiver of the rights asserted by J.E.T.S. in its appeal.

The government thereafter purported to exercise the second year option under the contract and directed J.E.T.S. to perform the contract services with the prices set forth in the contract. J.E.T.S. agreed to continue performance of the contract services during the second year option of the contract under protest, pending resolution of the then pending appeal, as provided in the Contract Disputes Act of 1978. To do otherwise would have subjected J.E.T.S. to the risk of a default termination.

The ABSCA decision in 26135 held that the attempted exercise of the first year option under the contract by the Air Force was invalid and that J.E.T.S.'s continued performance constituted a constructive change under the contract for which J.E.T.S. was entitled to receive an equitable adjustment. The Board remanded the appeal

to the Contracting Officer with directions to negotiate the amount of the contract adjustment.

As a matter of contract and as a matter of law the right of the government to exercise the second year option under the contract was dependent upon a finding that the government properly and validly exercised the first year option under the contract. Thus, when the Board determined that the government failed to properly exercise the first year option under the contract, the contract, as such, including the option provision, was not extended and there were no further options available for the third year.

Nevertheless, the appeal not having been determined and at the express direction of the Contracting Officer, J.E.T.S. performed the contract services for the first and second option years of the contract covering the period of 1 May 1981 to and including 30 April 1983 under protest and with a complete reservation of rights to J.E.T.S. to seek an equitable adjustment in the contract price for such period in accordance with the holding of the ASBCA in number 26135.

Thereafter, the time for appealing the decision of the Board in ASBCA No. 26135 expired and the decision became final. Appellant, through its attorney, prepared and filed with the Contracting Officer J.E.T.S.' claim for an equitable adjustment to the contract dated 21 December 1982 covering the period commencing 1 May 1981 through 30 November 1982. Subsequently that claim for equitable adjustment was amended to cover the period extending through 30 April 1983. The claim was properly certified as required by the Contract Disputes Act of 1978.

On 27 July 1983 J.E.T.S. filed its notice of appeal appealing from the failure of the Contracting Officer to issue a final decision within the time required by the Contract Disputes Act. Subsequent to the filing of appellant's notice of appeal, the Contracting Officer issued

his final decision dated 28 July 1983 denying appellant's claim in its entirety without negotiation or discussion in any manner or form.

The appeal was given ASBCA docket number 28642 and it was from a decision on a dispositive motion that the instant appeal is based.

J.E.T.S. filed a complaint on 6 December 1983. The government, after extension requests to file answer, filed its answer on 24 January 1984.

The initial contract was a 100% small business set-aside. J.E.T.S. certified to the United States that it was a small business.

On August 31, 1983, th grand jury of the United States District Court for the Middle District of Florida, Jacksonville Division, returned a 25 count indictment against Larry D. Barnette, Thomas F. Gibbs, Leo J. Barnette, Judge A. Causey, Murray Sentner, Allied Management Corporation dba J.E.T.S., Inc. and Jets Services, Inc. and Jets Venture Capital Corporation.

The indictment at no time mentioned the Vandenberg contract. The indictments dealt with the following specific contract activities:

1. A laundry services contract for the Federal Republic of Germany;

2. A food service contract at Fort Lee, Virginia;

3. A food service contract at McConnell AFB, Kansas; violations concerning its certificate as a small business. Appellant's false certification as a small business in a 100% small business set-aside procurement renders the contract void ab initio and entitles appellant as a matter of law to no additional funds for any alleged equitable adjustment.

4. Failure to exercise an option could not be a constructive change under the contract since the contract

ceased to exist when the government improperly exercised the option. However, to the extent it was performed the contract became valid.

On 16 April 1985 appellant J.E.T.S. moved for summary judgment striking the respondent's affirmative position. A copy of that motion is attached hereto, designated Exhibit "A" and incorporated herein by reference.

On 20 May 1985 the government filed a cross-motion for summary judgment and filed its brief. A copy of the cross-motion is attached hereto, designated Exhibit "B" and incorporated herein by reference.

The issues were well briefed by both sides.

On October 8, 1986, the United States Court of Appeals for the Eleventh Circuit affirmed the judgment of the United States District Court of Appeal. A copy of the decision is appended hereto, designated Exhibit "C" and incorporated herein by reference.

The defendants in that case are still pursuing various avenues of appeal.

On 21 January 1987, the Armed Services Board of Contract Appeals, the Honorable Ruth C. Burg, Administrative Judge, writing the lead opinion which was concurred in by the Honorable Daniel M. Arons, Administrative Judge, Acting Chairman, Armed Services Board of Contract Appeals, and the Honorable Harris J. Andrews, Jr., Administrative Judge, Acting Vice-Chairman, Armed Services Board of Contract Appeals, rendered an opinion on the government's motion for summary judgment and appellant's motion for summary judgment. A copy of that opinion is appended hereto, designated Exhibit "D" and incorporated herein by reference.

In that decision, the Board held that the government's arguments pursuant to items 1, 2 and 4 are without merit.

However, the Board held that appellant's contract was void ab initio because of its false certification as a small business on a 100% small business set-aside contract and, in so doing, granted the government's motion for summary judgment and denied the appeal and the appellant's motion for summary judgment.

Appellant timely filed this appeal and the matter is now properly before this court.

IT IS STIPULATED THAT THIS DOCUMENT, INCLUDING EXHIBITS "A" THROUGH "D", INCLUSIVE, AND THE NOTICE OF APPEAL AND APPEAL FROM DECISION OF THE ARMED SERVICES BOARD OF CONTRACT APPEALS CONSTITUTE A SETTLED STATEMENT OF THE FACTS OF THIS CASE AND CONSTITUTE A SUFFICIENT RECORD FROM WHICH A DECISION MAY BE RENDERED BY THIS COURT.

DATED: ———

DAVID M. COHEN, Director

ORALLY AGREED ON
BY TELEPHONE
WITH J. KEITH BURT

By ———————————

Trial/Appellate Attorney
Commercial Litigation Branch,
Civil Division, Department of
Justice, Washington, D.C. 20530
Attorney for Appellee
THE UNITED STATES

DATED: 9/22/87

GERSTL & GORMAN, INC.

By Hugo N. Gerstl
HUGO N. GERSTL
33 Soledad Drive
Monterey, California 93940-6093
Attorney for Appellant

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the County of Monterey. I am over the age of eighteen (18) years and not a party to the within, above-entitled action. My business address is 33 Soledad Drive, Monterey, California. On 9/22, 1987, I served the within AGREED STATEMENT IN LIEU OF APPENDIX on the other party(s) in said action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Postal Service mailbox at Monterey, California, addressed as follows:

Recorder
Armed Services Board of Contracts Appeals
200 Stovall Street
Alexandria, Virginia 22332-0700

Office of the Trial Counsel
Office of the Staff Judge Advocate
Air Force Logistics Command, JAB
Wright-Patterson AFB
Dayton, Ohio 45433-5000
Attention: Mark E. Landers, Esquire

David M. Cohen, Director
Commercial Litigation Branch
Civil Division
Department of Justice
Washington, D.C. 20530

Linda Maranda, Trial Counsel
Commercial Litigation Branch
550 11th Street, N.W.
Todd Building, Room 716
Washington, D.C. 20530

I, Kathleen Whitehurst, declare under penalty of perjury that the foregoing is true and correct. Executed on 9/22, 1987 in Monterey County, California.

/s/ _____
KATHLEEN WHITEHURST